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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 1335

RONALD KENT HOOPER AND
PURVIS OLE SCROGGS,

Petitioners,

vs.

THE HONORABLE WILLIAM H. GOODING,
Judge of the Superior Court of The State of Arizona; and
STATE OF ARIZONA, by ROBERT K. CORBIN,
County Attorney of Maricopa County,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARIZONA

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IN THE SUPREME COURT OF THE UNITED STATES

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No.

RONALD KENT HOOPER AND
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Judge of the Superior Court of The State of Arizona; and
STATE OF ARIZONA, by ROBERT K. CORBIN,
County Attorney of Maricopa County,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

Petitioners pray that a writ of certiorari issue to review an order of the Supreme Court of Arizona in Cause No. 9224 denying an application for a writ of mandamus.

OPINIONS BELOW

The order of the Supreme Court of Arizona (Appendix A) has not been reported.

JURISDICTION

The order of the Supreme Court of Arizona from which this petition is taken was entered on February 23, 1968 (Appendix A). This Court has jurisdiction under 28 U.S.C. Sec. 1257(3).

QUESTION PRESENTED

Can a state constitutionally require that all preliminary hearings in criminal cases, regardless of circumstances, be open to the public and the press? The subsidiary issues are fair trial, equal protection, and right to privacy.

CONSTITUTIONAL PROVISIONS AND RULE INVOLVED

The relevant constitutional provisions are the Fourth, Sixth, Ninth, and Fourteenth Amendments to the United States Constitution. These are all set forth in Appendix B. In addition, the case involves Rule 27 of the Rules of Criminal Procedure of the State of Arizona, which, prior to January 29, 1968, was as follows:

> "During the examination of any witness, or when the defendant is making a statement or testifying, the magistrate may and on the request of the defendant shall exclude all other witnesses. He may also cause the witnesses to be kept separate and prevented from communicating with each other until all are examined. The magistrate shall also, upon the request of the defendant, exclude from the examination every person except attorneys in the case, and officers of the court."

On January 29, 1968, the Supreme Court of Arizona deleted the last sentence of this Rule.

STATEMENT

The subject matter of this case has been fully described in the companion case, on petition for certiorari to the United States Court of Appeals for the Ninth Circuit, *Hooper v. Gooding.* We incorporate without repeating what has been said there. The Statement in that case covers the proceedings in the State trial court and the proceedings in the Supreme Court of Arizona leading to the denial of the application for the writ of mandamus. It is that judgment to which this petition is directed.

REASONS FOR GRANTING THE WRIT

For the reasons set forth in our main brief on petition for certiorari to the Ninth Circuit, the Supreme Court of Arizona's decition, the effect of which is to hold that a state trial court has no discretion to close preliminary hearings under any circumstances, conflicts with *Sheppard v. Maxwell,* 384 U.S. 333, 86 S. Ct. 1507, 16 L. Ed. 2d 600 (1966), and *Estes v. Texas,* 381 U.S. 532, 85 S. Ct. 1628, 14 L. Ed. 2d 543 (1965). It is a direct repudiation of the Reardon standards, and thus presents a question of general importance. The Federal questions here presented were also presented to the Supreme Court of Arizona in the application for mandamus.

The petition from the Supreme Court of Arizona is in a sense simpler than that from the Ninth Circuit because no questions of federal jurisdiction are involved and there are no details of the nature of the Findings of Fact of the Federal District Court; the holding of the Supreme Court of Arizona antedated those events. The Supreme Court of Arziona ruling presents in the simplest and most unabashed form the question of whether preliminary hearings shall be held by trial judges who have no power at all to control the publicity attendant upon them. Not only does the denial of this power conflict with the cases just cited; it also denies the right of privacy, *Griswold v. Connecticut,* 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965).

There is a further problem of equal protection of the laws. Petitioners should not be denied substantial rights solely because of the happenstance that they have been given a preliminary hearing rather than a grand jury proceeding. Any alternative to a grand jury indictment must afford a defendant due process. See *Hurtado v. California,* 110 U.S. 516, 4 S. Ct. 111, 28 L. Ed. 232 (1884); *Beck v. Washington,* 369 U.S. 541, 82 S. Ct. 955, 8 L. Ed. 2d 98 (1961); *Morford v. Fogliani,* 82 Nev. 79, 411 P.2d 122 (1966), *cert. denied,* 385 U.S. 963, 87 S. Ct. 399,

rehearing denied, 385 U.S. 1021, 87 S. Ct. 721 (1967). If the prosecution had proceeded under the grand jury provisions of the Arizona Rules of Criminal Procedure (Rules 81-108) the testimony offered to the grand jury could not be released by the express provisions of Rule 107. However, since the prosecution chose to proceed by complaint and preliminary hearing, the testimony will be disseminated because of Judge Gooding's failure to exercise his discretion. This creates an invidious, unjustified discretion and denies equal treatment to all citizens in the same category in at least two situations.

It is a basic element of due process and of equal protection that a person's rights should not be abridged as a result of the arbitrary exertion of power. See *Leland v. Oregon,* 343 U.S. 790, 72 S. Ct. 1002, 96 L. Ed. 1302 (1952); *Hillard v. Arizona,* 362 F.2d 908 (9th Cir. 1966). Here, the arbitrary selection of a preliminary hearing proceeding instead of a grand jury proceeding has resulted in a substantial likelihood that the defendants' rights to a free trial will be abridged.

The likelihood of an unfair trial in this case can be greatly lessened by the simple exercise of the trial judge's discretion. Very significantly, the discretion of the trial judge has been greatly extended in grand jury proceedings. For example, in *Pittsburgh Plate Glass Co. v. United States,* 360 U.S. 395, 79 S. Ct. 1237, 3 L. Ed. 2d 1323 (1959), the Court held that the disclosure of grand jury minutes in a federal criminal case is primarily within the discretion of the trial judge. This discretion has often been exercised liberally. See, *e.g., United States v. United Concrete Pipe Corp.,* 41 F.R.D. 538, 539 (N.D. Tex. 1966); *United States v. Pilnick,* 267 F. Supp. 791, 801 (S.D.N.Y. 1967). Since the grand jury system has been liberalized to permit the trial judge, in the exercise of his discretion, to provide advantages which are accorded to the defendant who is given a preliminary hearing, we believe that the correlative advantage must be given to the defendant who is taken through the preliminary

hearing route: the trial judge must be accorded the discretion to rule that, under proper cimcumstances, the defendant will be given the substantial rights to which he would have been entitled had he been prosecuted by means of a grand jury. If such discretion is not recognized, the petitioners here will be denied basic rights which are given to other defendants who, solely because of an arbitrary decision, are accorded the secrecy of a grand jury proceeding. Such unequal treatment is a flat denial of due process and of equal protection.

CONCLUSION

It is respectfully submitted that the petition for certiorari should be granted.

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April, 1968.

APPENDIX A

February 23, 1968

MEMO TO THE CLERK:

The following action was taken by the Supreme Court of the State of Arizona on Friday, February 23d, 1968:

ORDERED: Application for Writ of Mandamus—DENIED, in the following matter:

RON KENT HOOPER and PURVIS OLE SCROGGS, Petitioners, v. THE HON. WILLIAM H. GOODING, JUDGE OF THE SUPERIOR COURT OF THE STATE OF ARIZONA, IN AND FOR THE COUNTY OF MARICOPA; and STATE OF ARIZONA, by ROBERT CORBIN, COUNTY ATTORNEY OF MARICOPA COUNTY, Real Party in Interest, Respondents.	No. 9224

The Court consisted of Vice Chief Justice Jesse A. Udall, and Justices Fred C. Struckmeyer, Jr. and Lorna E. Lockwood.

Dated at Phoenix, Arizona, February 23d, 1968.

JESSE A. UDALL,
Vice Chief Justice

cc—Lewis, Roca, Beauchamp & Linton
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Robert K. Corbin, County Attorney of Maricopa County
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The Hon. William H. Gooding
Judge of Maricopa County Superior Court
101 West Jefferson
Phoenix, Arizona

APPENDIX B

CONSTITUTION OF THE UNITED STATES

AMENDMENT IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

AMENDMENT IX.

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

AMENDMENT XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.